No. 90-1378

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL., PETITIONERS

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class, RESPONDENTS

and

THE HONORABLE JAMES MCGIRR KELLY,
NOMINAL RESPONDENT

IN RE ASBESTOS SCHOOL LITIGATION

D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent school districts ("plaintiffs") and Lake Asbestos of Quebec Ltd. ("LAQ") raise five arguments in response to the petition for certiorari filed by United States Gypsum Company and others in No. 90-1378 ("the petition"). None of these arguments alters the conclusion that the court of appeals has issued an unprece-

dented ruling that expands federal diversity jurisdiction. The petition should be granted.[1]

1. *The challenge to the jurisdictional allegations is not moot.* Plaintiffs argue that the court of appeals' rulings have been effectively superseded in this action, because shortly after the opinions below were filed, the district court allowed the plaintiffs to amend the class definition to include only those schools that have or had friable asbestos-containing building material. Br. in Op. at 3. Plaintiffs then say:

> Defendants have not contested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000.

Id. at 3-4. Plaintiffs argue that the class redefinition has therefore taken the amount in controversy issue "out of the case." [2] *Id.* at 10.

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[1] The questions presented in No. 90-1378 are:

1. Whether under the federal diversity statute, 28 U.S.C. § 1332, plaintiffs in a diversity case must include in the complaint factual allegations sufficient to support subject matter jurisdiction over each of the claims presented.

2. Whether in a diversity-based class action brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, each plaintiff must be diverse from each defendant from whom that plaintiff seeks to recover.

[2] Plaintiffs suggest that the class redefinition by its terms excludes those plaintiffs whose claims were for less than $10,000. *See* Br. in Op. 3. In fact, the new definition simply eliminates those school districts that do not have friable asbestos, with no mention of the amount in controversy. *Id.* at A-1. Of course, even if the new definition had included a limitation based on the jurisdictional amount (*e.g.*, "those schools with claims in excess of the jurisdictional minimum"), such a definition would have been improper; this type of tautological definition was specifically rejected by the district court in *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

This argument is extremely misleading, because it erroneously implies that plaintiffs have actually *made* "the good faith allegation" that each member of the newly-defined class had a claim in excess of the jurisdictional amount when the complaints were filed. In fact, plaintiffs have never sought leave to amend the existing complaints to allege that "each" member of the redefined class either has or had a claim in excess of $10,000. The jurisdictional allegations today are identical to those that were before the court of appeals and the district court; these pleadings admit that the claims of an unknown number of plaintiffs fail to satisfy the requirements of § 1332(a), and fail to make an allegation on behalf of a single unnamed class member that would permit the district court to exercise jurisdiction over that class member's claims. *See* App. 91a; Br. in Op. at 8-9 n.16.

Nor has the district court concluded *sua sponte* that each member of the newly-defined class could make the required allegation. Although plaintiffs suggest that the opinion accompanying Pretrial Order No. 273 makes such a determination, a full reading of the opinion shows that the court was summarizing plaintiffs' suggestions regarding the impact of the redefinition.[3] The district court, however, overstated the plaintiffs' representations: while plaintiffs strongly implied that the redefinition would moot the amount-in-controversy issue, they never specifically alleged that the redefinition would eliminate all class members who did not have a jurisdictionally sufficient claim. In fact, when questioned by the court of ap-

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[3] The complete quotation from the district court's opinion accompanying Order No. 273, which plaintiffs set forth in part at page 10 of their Brief, is that "the *Plaintiffs* have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain 'friable' asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000." Br. in Op. at A-2 (emphasis added); *see also id.* at A-4.

peals on this exact point, plaintiffs' counsel would *not* say that each of the remaining class members could make the necessary allegation. All counsel would say is that "virtually" all plaintiffs could make the required allegation if the class were redefined. App. 130a. Even in this Court, plaintiffs have stopped short of saying that the required allegation can be made.

If plaintiffs were to amend the complaints to actually allege what they consistently hint at—that each member of the existing class had a sufficient claim—this issue might truly be moot. But the only logical conclusion that can be drawn from the failure to make the required allegation is that plaintiffs simply cannot do so in good faith. School districts with *currently* friable asbestos-containing products did not necessarily have a claim in excess of $10,000 at the time the complaints were *filed*, which is, of course, the critical time for determining subject matter jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). Plaintiffs have repeatedly argued that asbestos-containing products may "become" friable over time, and thus, it would be impossible to make a blanket assertion that those schools that now have friable asbestos-containing products necessarily had friable products in their buildings in 1983, when these actions began.[4]

In short, the amount-in-controversy question is not moot, because the class redefinition has not affected the question presented in any meaningful way. This petition is directed to the complaints, and the complaints still do

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[4] Even if all the schools left in the class had friable asbestos-containing building products in 1983, and even if it were possible to determine today what year a product became friable, it still would be unlikely that the required allegation could be made. Plaintiffs indicate that some members of the newly defined class could only make a sufficient claim if punitive damages were included. *See* Br. in Op. at 3-4. Several states, however, do not allow punitive damages. *See, e.g., Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472, 474 (1975) (Nebraska law).

not allege—and plaintiffs apparently cannot allege—that each class member had a claim in excess of $10,000. The decisions below still permit the district courts to proceed on the assumption that subject matter jurisdiction is proper. Subsequent events have not made the problems created by these decisions less troublesome, *see* Pet. at 16-20, and therefore have not vitiated the need for review by this Court.[5]

2. *The district court has never had jurisdiction over the claims of the absent class members.* Another reason offered for denying certiorari is as follows: plaintiffs argue that the district court "undoubtedly" had and has jurisdiction over these "cases" because "there are *named* plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants." Br. in Op. at 10 (emphasis added). They further argue (without citation to authority) that the question is not whether the federal court has jurisdiction, but merely how many of the un-

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[5] Indeed, recent events have confirmed the need for further review. In their petition, U.S. Gypsum and others identified the "one-way intervention" phenomenon as a danger created by the decisions below. Pet. at 14-15. An example of this problem may now be occurring in the "Agent Orange" litigation, another national, diversity-based class action in federal court. Defendants in that case thought they had reached a settlement in 1984 with all individuals who could assert claims based on exposure to Agent Orange. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 484 U.S. 1004 (1987). After a settlement was reached, a new group of plaintiffs filed a separate class action in Texas state court, arguing that they were not bound by the earlier judgment because their claims had not yet arisen by 1984. Although defendants removed the action to federal court and sought to have the case assigned to the trial judge who presided over the federal class action, plaintiffs have sought remand on the ground that the federal courts lack subject matter jurisdiction over the newly-filed action, since diversity is lacking. Defendants in that litigation now face the possibility of litigating against individuals whom they thought would be bound by the earlier judgment. Although plaintiffs in the Texas action have not yet argued that the federal court lacked diversity jurisdiction over their claims in the first class action, the case highlights the dangers faced by defendants here.

named plaintiffs are proper members of the class. Plaintiffs contend that it would be "burdensome and unnecessary" for the district court to make such a determination now, eight years after the litigation began, and that continued deferral of the pleading requirement is therefore appropriate. *Id.* at 10.

This argument is pointless. The issue is the district court's jurisdiction over *claims*, not "cases"; U.S. Gypsum has sought only to prohibit the district court from adjudicating the claims of absent class members until a pleading sufficient to invoke the district court's jurisdiction over those claims is filed. The fact that the *named* plaintiffs allege a claim in excess of $10,000 does not give the court jurisdiction over the claims of any class member for which no such allegation has been made; that is the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Plaintiffs' declaration that the district court "surely" has had jurisdiction since the complaints were filed also ignores the settled rule that unless and until the pleadings set forth a sufficient basis to invoke jurisdiction, a federal court has no authority over the claims. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); *Turner v. President, Directors and Company of the Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). *See also* Pet. at 13. The fact that it may be "inconvenient" or "burdensome" for a federal court to establish its own jurisdiction has never been a proper basis to excuse the failure to make the required pleading. *Cf. Aldinger v. Howard*, 427 U.S. 1, 15 (1975). Plaintiffs should not be allowed to gloss over this failure by pretending that this issue involves nothing more than an administrative task of dismissing parties. *See* Br. in Op. at 9-10.

Finally, the district court already has issued more than 300 pretrial orders, granted partial summary judgment in favor of several defendants against the entire

class, and entered a final judgment that dismissed the claims of all plaintiffs against LAQ with prejudice. *See* Pet. at 19. All of these actions were taken without determining which claims were properly before the court. Despite plaintiffs' assertions to the contrary, this is the behavior of a court of general jurisdiction: the district court has assumed jurisdiction over the claims before it with no factual allegation or proof to support that assumption, solely for the purpose of maintaining the largest possible plaintiff class.

3. *Rule 12(d) does not grant the power to postpone a facial attack to the court's subject matter jurisdiction.* The petition provides several reasons why the court of appeals' reliance on Fed. R. Civ. P. 12(d) is misplaced. Pet. at 17-18. Plaintiffs do not respond to these points; they do, however, make a new attempt to reconcile Rule 12(d) with Rule 12(h)(3), which requires the court to dismiss "whenever it appears" that subject matter jurisdiction is lacking. Plaintiffs argue that Rule 12(h) "indicates only when particular kinds of objections must be raised to avoid waiver." Br. in Op. at 9 n.17.

This interpretation is different (although no more persuasive) than the court of appeals' similar attempt to avoid the plain language of the Rule. *See* Pet. at 17. Rule 12(h)(3) is a directive to the *court*, not the parties, which requires dismissal once it "appears" that there is no jurisdiction. It is hard to imagine an instance where the lack of jurisdiction is more apparent than when the defect appears on the face of the complaint. This distortion of the Rules of Procedure, and the resulting expansion of federal court authority over state law claims, is reason enough for this Court to review the decisions below.

4. *The Judicial Improvements Act does not undermine the importance of the complete diversity issue.* For the second question presented, plaintiffs raise only one point

that is not addressed in the petition. They argue that the Judicial Improvements Act of 1990 (the "Act") now provides that in diversity-based class actions filed after December 1, 1990, district courts may exercise "supplemental" jurisdiction over the claims of, *inter alia*, absent class members who are not diverse from the defendants. Accordingly, plaintiffs argue, any issue regarding the requirements of § 1332 as applied in class actions is now of limited importance. Br. in Op. at 11-13.

The impact of the Judicial Improvements Act on future diversity-based class actions is at best unclear. As plaintiffs acknowledge, the "new statute was 'not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [*v. United States*, 490 U.S. 545 (1989)]' " Br. in Op. at 12 (*quoting* H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990)). The interpretation of § 1332 prior to the Act therefore will continue to affect future cases, and the validity of a "class action exception" to the traditional rule of complete diversity remains a matter of great importance.

Plaintiffs also suggest that Congress's reaction to *Finley*, as reflected in the Act, undercuts the merits of the petition. *Finley*, however, was simply the latest in a series of cases that limited the availability of pendent and ancillary jurisdiction over the claims of absent class members. It was these decisions, not simply *Finley*, that effectively undermined whatever continuing force the *dicta* from *Snyder v. Harris*, 394 U.S. 332 (1969), may have had. *See* Pet. at 23-28.

In any event, by its terms the Act has no application to the current cases. There never has been a holding by this Court on whether class actions are entitled to a rule of "limited diversity," an issue that is squarely presented by this Petition. Given the significance of this question generally, and the apparent intent of the Act to preserve pre-*Finley* doctrine, this case presents the ideal opportunity to resolve this issue.

5. *The questions presented were raised and decided in the appeal from the LAQ settlement.* Respondent LAQ argues that the questions in the petition were "not decide[d]" in the appeal from the final judgment approving the settlement between LAQ and the plaintiffs. LAQ Br. in Op. at 4-6. This is incorrect. In the district court and the court of appeals, petitioners raised the same challenges to the courts' subject matter jurisdiction that are raised in the petition. The court of appeals squarely rejected the appeals, and affirmed the entry of final judgment.

It is the LAQ opinion that makes the pernicious effects of the rulings below most clear. It was in the LAQ opinion that the court of appeals took its earlier rationale that allowed a *deferral* of the jurisdictional inquiry, and with a leap of logic, transformed it into a ruling that "jurisdiction in the trial court was proper." App. 49a. By affirming the judgment, the court of appeals therefore has made it clear that a federal court can finally resolve claims without ever having determined that it had authority to do so, and without requiring a sufficient pleading. This is precisely the issue raised in the petition.

Finally, if petitioners are correct that the district court lacks subject matter jurisdiction on the basis of the current complaints, it would make little sense to allow the affirmance of the LAQ final judgment to stand. Review of both opinions below is therefore warranted.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

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